Time, Justice and Human Rights: Statutory Limitation on the Right to Truth ?

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Although not explicitly set out in the Universal Declaration of Human Rights and other foundational human rights documents, there is an growing recognition of a fundamental 'right to truth'. This is often expressed as a component of the requirement that justice be delivered for serious violations of human rights, including the core principles of the right to life and the prohibition of torture. Transitional justice requires various measures of accountability of which criminal prosecution of perpetrators is only one element. However, recent decision of international courts and tribunals, including the European Court of Human Rights and the International Court of Justice, manifest a reluctance to extend the right to truth too far into the past. It is as if they have imposed a form of time bar or statutory limitation on the right to know the truth, even when the inquiry concerns the very atrocities, namely genocide, crimes against humanity and war crimes, whose prosecution cannot be restricted.

That legal rights and entitlements are subject to temporal limitation is not a controversial proposition. In many legal systems, even a murder cannot be prosecuted after a certain lapse of time. During the 1960s, just two decades after the Nuremberg trial, many convicted and released war criminals were being re-integrated into society and returning to their professional networks, while others who bore responsibility for wartime atrocities were still at large. Statutory limitation or prescription of prosecution in some countries threatened to block accountability. In order to address this, the United Nations undertook work on an international convention to deal with the issue.

In November 1968, the General Assembly adopted the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[1] The treaty entered into force two years later after obtaining its tenth ratification.[2] To date, fewer than fifty-five States have ratified the treaty. In 1974, the Council of Europe adopted its own regional treaty on the same subject. Although open to all forty-seven members of the Council of Europe, only three have ratified the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes.[3] The lack of enthusiasm for the treaties on the subject might suggest equivocation on the subject by many States, but this does not appear to

be the case. Article 29 of the Rome Statute of the International Criminal Court, adopted in 1998, declares that genocide, crimes against humanity, war crimes and the crime of aggression are 'not be subject to any statute of limitations'. There are 124 States Parties to the Rome Statute and several other States have signed it. International judges have spoken of 'a broad and recent consensus, the criminal punishability of crimes against humanity without any time-limit can be considered as a principle of customary international law, binding on all States'.[4]

The 1968 Convention may be viewed as the first foray of the United Nations into accountability for historic atrocities. At its first session, in 1946, the General Assembly had adopted a resolution affirming the 'principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the International Military Tribunal'.[5] The same day, another resolution was adopted recognizing genocide as an international crime, confirming in its preamble that '[m]any instances of such crimes of genocide *have occurred*'.[6] However, the United Nations was not then involved in the investigation of human rights violations. Its members would have shuddered at the idea that the organization would concern itself not only with the present and the future but also with the past.

By the 1990s, the United Nations human rights organs began to speak about a 'right to truth'. This had already emerged at the regional level. In 1986, the Inter-American Commission on Human Rights observed that 'every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future'.[7] In his 1997 report to the United Nations to the Sub-Commission on the Protection and Promotion of Human Rights, Louis Joinet, a long-time expert within the United Nations human rights system, wrote:

> This is not simply the right of any individual victim or his nearest and dearest to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a 'duty to remember' on the part of the State: to be forearmed against the perversions of history that go under the names of revisionism or negationism, for the history of its oppression is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right.[8]

Joinet listed the 'right to truth' as Principle 1 in the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, where it was

presented as a right of a 'people' rather than of individuals:

> Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.[9]

In the French version, he wrote: 'Chaque peuple a le droit inaliénable…'. Principle 2, entitled 'The Duty to Remember', stated:

> A people's knowledge of the history of their oppression is part of their heritage and, as such, shall be preserved by appropriate measures in fulfilment of the State's duty to remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.[10]

Principle 5 required that States 'ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law'.[11]

A decade later, the United Nations Commission on Human Rights requested independent expert Diane Orentlicher to prepare an updated version of the Principles. Professor Orentlicher made some minor changes to the text of Joinet's first principle:

> Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.[12]

She also reformulated the text about '[a] people's knowledge of the history of its oppression' and the importance of archives, saying this was 'part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations'.[13]

Inevitably, the past – indeed, the rather distant past – surfaced as an issue at the Durban Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance in September 2001. The Declaration adopted by the Conference emphasized 'remembering the crimes or wrongs of the past' and 'telling the truth about history' were 'essential elements for international reconciliation and the creation of societies based on justice, equality and solidarity'.[14] The Declaration stressed 'teaching about the facts and truth of the history of humankind from antiquity

to the recent past', all of this 'with a view to achieving a comprehensive and objective cognizance of the tragedies of the past'.[15] It referred specifically to slavery, the slave trade, the transatlantic slave trade, apartheid, colonialism and genocide, and indicated the relationship between these historic abuses and those of the present day.[16] It also referred to 'dark chapters in history'.[17] The equivocal conclusion spoke of a 'moral obligation on the part of all concerned States', saying they should take measures 'to halt and reverse the lasting consequences of those practices'.[18] Another deliberate ambiguity in the Declaration concerned the application of international criminal law to the past: '[S]lavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade'.[19]

The first United Nations Human Rights Council resolution on the right to truth declared that 'the public and individuals are entitled to have access, to the fullest extent practicable, to information regarding the actions and decision-making processes of their Government, within the framework of each State's domestic legal system'. [20] Furthermore, 'States should preserve archives and other evidence concerning gross violations of human rights and serious violations of international humanitarian law'.[21] The Resolution requested the Office of the High Commissioner for Human Rights to prepare a comprehensive study of the question, 'including, in particular, practices relating to archives and records concerning gross violations of human rights with a view to create guidelines on protecting archives and records concerning gross human rights violations'.[22]

Following the presentation of the Report of the Office of the High Commissioner, the Human Rights Council adopted a resolution that highlighted 'the importance of preserving historic memory related to gross human rights violations and serious violations of international humanitarian law through the conservation of archives and other documents related to those violations'.[23] Subsequently, the Human Rights Council noted a report on the subject by the Office of the High Commissioner that pointed to the importance of ensuring 'that all archives pertaining to human rights are preserved and protected, and to enact legislation that declares that the nation's documentary heritage is to be retained and preserved, and creates the framework for managing State records from their creation to destruction or preservation'.[24] The General Assembly has justified the protection of archives as a measure necessary to 'facilitate knowledge' of gross violations of human rights and serious violations of international humanitarian law.[25]

The 'Procedural Right to Truth' at the European Court of Human Rights

Louis Joinet's early discussion of the right to truth did not point to specific provisions of the Universal Declaration of Human Rights or the treaties. Nevertheless, his remarks were situated in a discussion of impunity where two fundamental rights -- the right to life and the prohibition of cruel, inhuman or degrading treatment -- are of particular importance. In this context, the European Court of Human Rights has developed the notion of a 'procedural dimension' to these rights.[26] Accordingly, there is an obligation upon the State to investigate violations of these fundamental rights even if it is not itself responsible for them as a perpetrator. The procedural obligation of the right to life, set out in article 2 of the European Court of Human Rights, has been held to be 'separate and autonomous' from the substantive obligation.[27]

According to the European Court of Human Rights, the procedural obligation entitles victims, their families and heirs to know the truth about circumstances associated with a violation of the right to life, especially when this is linked to a large scale or massive violation of fundamental rights. For example, it has stressed the importance of this 'in the event of widespread use of lethal force against the civilian population during anti-Government demonstrations preceding the transition from a totalitarian regime to a more democratic system'.[28] Although the issue arises in the context of individual rights, there is some authority in the Court's jurisprudence for the recognition of a broader collective or social dimension to this right to know the truth. Several cases will illustrate this.

In one decision regarding Romania, the Court framed the importance of an investigation into events in light not only of the rights of the individual applicants but 'in view also of the importance to Romanian society of knowing the truth about the events of December 1989'.[29] In another instance, *El Masri v. the 'former Yugoslav Republic of Macedonia'*, where government complicity in 'extraordinary renditions' by the Central Intelligence Agency was involved, the Grand Chamber of the European Court of Human Rights underscored 'the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened'.[30] In a concurring opinion in that case, several judges noted that the right to truth was implicit in the European Convention, in particular within the procedural obligation of articles 2

(right to life) and 3 (prohibition of torture and inhuman or degrading treatment or punishment), although they argued that it was best approached from the perspective of article 13 (right to a remedy). They wrote:

> In practice, the search for the truth is the objective purpose of the obligation to carry out an investigation and the raison d'être of the related quality requirements (transparency, diligence, independence, access, disclosure of results and scrutiny). For society in general, the desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law. For those concerned – the victims' families and close friends – establishing the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so. Ultimately, the wall of silence and the cloak of secrecy prevent these people from making any sense of what they have experienced and are the greatest obstacles to their recovery.[31]

In *Abu Zubaydah v. Poland*, which concerned complicity of Polish authorities in the torture of a prisoner who was being transferred to Guantanamo by the United States Central Intelligence Agency, a Chamber of the Court wrote:

> [W]here allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened.[32]

Yet another decision of the European Court, referring to the killings by soldiers during the conflict in Northern Ireland, insisted upon the importance of a 'reasoned decision available to reassure a concerned public that the rule of law had been respected'.[33]

In another of the rendition cases, *Al Nashiri*, the Court cited at length from the testimony of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while counteracting terrorism about the importance of the right to truth, although it did not use the expression in its actual holding. The Rapporteur told the Court that 'within the United Nations it was seen as a right which had two dimensions – a private dimension and a public dimension. It was the consistent position of the UN mechanisms that where gross or systematic human rights violations were alleged to have occurred, the right to know the truth was

not one that belonged solely to the immediate victim but also to society.'[34]

Then there was the case surrounding the thousands of Polish officers murdered at Katyn, which will be discussed at length below. Granting an application based upon article 3 of the European Convention, a Chamber of the European Court said it appreciated the fact that their descendants had 'suffered a double trauma: not only had their relatives perished in the war but they were not allowed, for political reasons, to learn the truth about what had happened and forced to accept the distortion of historical fact by the Soviet and Polish Communist authorities for more than fifty years'.[35] In its arguments the Grand Chamber also cited submissions, this time from the Open Society Justice Initiative, about the right to truth.[36]

Katyń at the European Court

If there is such a broad, collective, historical dimension to the right to truth, when does it actually begin? Or rather, to return to the discussion on statutory limitation with which this chapter began, is it time barred? Do the principles prohibiting statutory limitation of crimes against humanity and war crimes provide legal muscle to help pry open the door to the more distant past in such a way that ordinary procedural and jurisdictional limitations do not apply in the same inflexible manner as they may when so-called ordinary crimes are concerned?

This is an issue that does not arise, at least not in the same way, as long as the right to truth is confined to the victims themselves or to their next of kin. From the perspective of individual victims, the right presumably exists only as long as they or their offspring are themselves alive.[37] Perhaps the right can even be transmitted to one or more succeeding generations. But when the right is associated with the 'people's knowledge of the history of its oppression', and when it is 'aimed at preserving the collective memory from extinction' because it is 'a collective right, drawing upon history to prevent violations from recurring in the future', can there be any logical basis for a temporal limitation on its scope? This difficult question was complicated even further by a 2013 ruling by a sharply divided Grand Chamber of the European Court of Human Rights that imposed a form of statutory limitation on the right to truth. It barred the door to claims based upon the procedural obligation if the actual loss of life occurred prior to the adoption of the European Convention on Human Rights in November 1950.

The case concerned the refusal of Russia to release documents on the Katyń massacre, the mass murder of about 20,000 Polish officers that took place in 1940, after eastern Poland had been occupied by the Soviet Union following the German invasion of the western part of the country. At the insistence of the Soviet prosecutors, the Nazi defendants were accused of responsibility for the killings by the International Military Tribunal at Nuremberg. After hearing two days of inconclusive evidence in the final days of the trial, the judges simply ignored the issue in their final ruling.[38] The Soviet government persisted in its denial of responsibility for several decades. Only in 1990 did Mikhail Gorbachev finally acknowledge the truth. Yet years after the admission of guilt, the Russian government continued to refuse to release files and documents related to the killings on grounds of national security. Relatives of the victims complained of Soviet intransigence before the European Court of Human Rights.

It is well established in case law that from the moment that the European Convention enters into force for any given State, there is an obligation upon the State Party to 'secure to everyone' the rights and freedoms set out in Section I of the Convention. Beginning with this 'critical date', all of the State's acts and omissions 'not only must conform to the Convention but are also undoubtedly subject to review by the Convention institutions'.[39] In other words, the obligations of a State Party to the European Convention are in principle only prospective in nature. The corollary to this is rooted in the presumption that international treaties do not operate retroactively unless a different intention appears from the treaty or is otherwise established, something confirmed in article 28 of the Vienna Convention on the Law of Treaties. Consequently, the treaty provisions 'do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'.[40] According to the European Court, 'the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to that date'.[41] The Grand Chamber has stated that this principle is 'beyond dispute'.[42]

The European Convention entered into force on 3 September 1953 following the deposit of the tenth ratification by a Member State of the Council of Europe, as provided for by article 59(3) of the Convention. For States that have ratified or acceded to the Convention subsequent to that date, the Convention enters into force on the date of deposit of its instrument of ratification or accession with the Secretary-

General of the Council of Europe, pursuant to article 59(4). However, exceptionally the Court may take into account facts that took place prior to the 'critical date' in considering the procedural obligation associated with certain fundamental rights, notably those in articles 2 and 3 of the Convention. Where a substantive violation of the right to life has taken place before the 'critical date', the Convention may nevertheless apply to the duty of the State Party to conduct an investigation and to ensure that measures of accountability exist. In disappearance cases, even if the body has been found, '[t]his only casts light on one aspect of the fate of the missing person and the obligation to account for the disappearance and death, as well as to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain'.[43]

Following divergences in the case law of the Chambers of the European Court,[44] in 2009 the Grand Chamber confronted the temporal jurisdiction issue with respect to the procedural obligation in a case dealing with medical malpractice. It recognised a procedural obligation pursuant to article 2 of the Convention even if the actual killing took place prior to the entry into force of the Convention for the respondent State. Article 2 establishes that '[e]veryone's right to life shall be protected by law' and that '[n]o one shall be deprived of his life intentionally'. By fifteen votes to two, the Grand Chamber held that 'the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty' that constitutes 'a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date'.[45] Nevertheless, the Court said that 'having regard to the principle of legal certainty' this extension of the temporal jurisdiction of the Court was 'not open-ended'.[46] The Grand Chamber explained the limitations it was placing on the procedural obligation:

> 162. First, it is clear that, where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction.
> 163. Second, there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect. Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – will have been or ought to have been carried out after the critical date. However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.[47]

In this way, the Grand Chamber established an exception within an exception. The Court could only exercise jurisdiction with respect to a violation of the procedural obligation contained in article 2 if a 'significant proportion of the procedural steps' had been undertaken after the 'critical date'. However, this requirement could be waived if 'certain circumstances' required the Court 'to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner'. This 'underlying values' exception has sometimes been called the 'humanitarian clause'.[48] These words amounted to an invitation to victims to formulate applications relating to investigation of historic violations of the right to life where the truth was still obscure, including the Katyn massacre. Within a few years such a case, *Janowiec and Others v. Russia*, filed by relatives of those who had been murdered at Katyn, presented itself to the European Court.

In *Janowiec*, the Grand Chamber of the European Court of Human Rights held that it could not consider the 'underlying values' exception if the loss of life had taken place prior to 4 November 1950, the date when the European Convention on Human Rights was signed at the Barberini Palace in Rome. It said that 'a Contracting Party cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention'.[49] The Grand Chamber explained that 'the events that might have triggered the obligation to investigate under Article 2 took place in early 1940, that is, more than ten years before the Convention came into existence'. It said that 'there were no elements capable of providing a bridge from the distant past into the recent post-entry into force period'.[50] At first instance, before the Chamber, the Russian judge had written that the European Convention on Human Rights had 'arisen out of a bloody chapter of European history in the twentieth century' but that it was drafted as part of a process of reconstructing post-war Europe and 'not with the intention of delving into that black chapter'.[51]

The very substantial dissenting opinion of Judges Ziemele, De Gaetano, Laffranque and Keller harshly criticises the majority for turning a 'long history of justice delayed into a permanent case of justice denied'.[52] With respect to the 'underlying values' exception in *Šilih*, the dissenters noted that the majority simply did not apply it. The majority's decision 'closes the Court's door to victims of any gross human rights violation that occurred prior to the existence of the Convention', they wrote.[53] By failing to implement the 'humanitarian clause', the dissenters said

that the Court has failed 'to fulfil the role for which it was intended: to provide a Court that would act as a "conscience" for Europe'.[54] It is indeed hard to be a 'conscience' if one refuses to even consider the past. Where else does 'conscience' come from if not the past?

In *Janowiec and Others*, it was argued that one factor justifying extension of the temporal jurisdiction of the Court, on an exceptional basis, was the importance of truth seeking in order to enable nations to learn from their history and take measures to prevent future atrocities.[55] Reliance was placed upon the Updated Set of Principles drafted by Professor Orentlicher as well as on the International Committee of the Red Cross rules of customary international law[56] and the case law of the Inter-American Court of Human Rights.[57] However, the Grand Chamber distinguished the procedural obligation of individual victims comprised in article 2 from 'other types of inquiries that may be carried out for other purposes, such as establishing a historical truth'.[58] The four dissenting judges said that in addition to the rights of the individual victims, 'it is equally clear that the obligation to investigate and prosecute those responsible for grave human rights and serious humanitarian law violations serves fundamental public interests by allowing a nation to learn from its history and by combating impunity'.[59]

The 'passage of time'

In recent rulings on the incompatibility of genocide denial legislation with freedom of expression, the European Court of Human Rights has referred to 'the time factor'. A seven-judge Chamber said that when debates on historical issues are concerned, 'the passing of time makes it inappropriate to deal with certain remarks about historical events, many years on, with the same severity as just a few years before. That forms part of the efforts that every country must make to debate its own history openly and dispassionately.'[60] The Grand Chamber in the same case, after citing an earlier precedent where the impugned speech concerned events forty years earlier, said that with respect to the Armenian genocide of 1915 'the lapse of time between the applicant's statements and the tragic events to which he was referring was considerably longer, about ninety years, and at the time when he made the statements there were surely very few, if any, survivors of these events'. The Grand Chamber noted that some of the interveners in the case had emphasized 'that this was still a live

issue for many Armenians, especially those in the diaspora'. It said 'the time element cannot be disregarded. Whereas events of relatively recent vintage may be so traumatic as to warrant, for a period of time, an enhanced degree of regulation of statements relating to them, the need for such regulation is bound to recede with the passage of time.'[61] The European Court has made similar pronouncements in cases dealing with Nazi sympathizers in wartime Switzerland[62] supporters of communism in modern-day Hungary,[63] torturers in Algeria,[64] defence of French collaborators during the Second World War,[65] as well as in cases dealing with individual reputation and image.[66]

The European Court's 'passage of time' approach seems rather close to the concept of statutory limitation or prescription. In the Armenian genocide case, however, the Court seemed to be saying to the descendants of victims of the 'crime of crimes' that as a century had passed since the atrocities were committed perhaps they were insisting too much. Seven members of the Grand Chamber dissented from the majority, specifically challenging its views on the passage of time issue. 'Are we to infer that in twenty or thirty years' time, Holocaust denial itself might be acceptable in terms of freedom of expression?', wrote the dissenters. 'How can this factor be squared with the principle that statutory limitations are not applicable to war crimes and crimes against humanity?'[1]

The Spanish Civil War and the Special Rapporteur on Truth

The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, a mandate established by the Human Rights Council in 2011, confronted some of these issues, but only indirectly, in his 2014 report on a mission to Spain. Pablo de Greiff welcomed efforts at the removal of symbols or monuments exalting the military uprising, the Civil War and Franco's dictatorship.[67] Noting the importance of the teaching of history, he urged that it be 'approached as a system of investigation rather than a mechanism for simply preserving data [that] can train citizens in habits of analysis and critical reasoning'.[68] He discussed a number of measures under consideration as means of elucidating the truth about Spain's history, including oral history projects, a possible truth commission, and access to archival

[1] *Perinçek v. Switzerland* [GC], no. 27510/08, Joint Dissenting Opinion of Judges Spielmann, Casadevall, Berro, de Gaetano, Sicilianos, Silvis and Kūris, § 8, 15 October 2015.

materials. De Greiff was of course focusing his attention on the Spanish Civil War of 1936-1939, a conflict that took place prior to Spain's membership in the United Nations, indeed, prior to the existence of the United Nations and, moreover, prior to the modern recognition in international law of fundamental human rights including the right to life and the prohibition of ill treatment.

Whether United Nations human rights mechanisms have the authority to examine issues relating to the Spanish Civil War is an issue that has also arisen before other bodies. In its report to the Committee on Enforced Disappearances, Spain explained that following its ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, 'certain organizations — associations and non-governmental organizations (NGOs) which may or may not have consultative status — have raised the issue of its applicability to enforced disappearances alleged to have taken place during the civil war and under the Franco regime and the need to abrogate or declare inapplicable the Amnesty Act (No. 46/1977) of 15 October'. Spain invoked article 35(1) of the Convention that declares the Committee to be competent 'solely in respect of enforced disappearances which commenced after the entry into force of this Convention'.[69] The International Convention for the Protection of All Persons from Enforced Disappearance is often cited because it is the only international human rights treaty with an explicit recognition of the right to truth. The final recital of the Convention's preamble '[a]ffirm[s] the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end'. Article 25(2) states: 'Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.'

Recently, the Working Group on Enforced or Involuntary Disappearance has also considered Spanish cases relating to the civil war. Spain did not object to the Working Group's authority to inquire into these cases.[70] Previously, however, it seems that the Working Group declined to consider disappearances that occurred prior to the creation of the United Nations in 1945.[71] In any event, enforced disappearance has special features because of its continuous nature,[72] something that cannot be said about a violation of the right to life or the prohibition of ill treatment.

The Special Rapporteur on the promotion of truth did not speak to whether he had 'jurisdiction' over the Spanish Civil War and fascist Spain. Like the Working Group on Enforced or Involuntary Disappearances, his mandate says nothing specific about its temporal scope. Moreover, if an unresolved disappearance is a continuing violation, surely the same can be said about a partial or incomplete truth. The closest authority for the Special Rapporteur appears to be operative paragraph 1(b) of the relevant resolution: 'To gather relevant information on national situations, including on normative frameworks, national practices and experiences, such as truth and reconciliation commissions and other mechanisms, relating to the promotion of truth, justice, reparation and guarantees of non-recurrence in addressing gross violations of human rights and serious violations of international humanitarian law, and to study trends, developments and challenges and to make recommendations thereon.'[73] If this passage is read literally, he is on reasonably solid ground. But if his mandate applies to the distant past then can this also be said about the other special procedures? Would there not be strenuous opposition within the Human Rights Council and the General Assembly if the Special Rapporteur on extrajudicial, summary or arbitrary executions were to investigate lynching in the United States prior to the Second World War or if the Special Rapporteur on torture were to inquire into the colonial practices of Britain, France, Belgium and the Netherlands in the 1930s? Moreover, if the Special Rapporteur on the promotion of truth can inquire into the Spanish Civil War and its aftermath, can there be any logical reason why he could not also, within the context of his mandate, address issues of historical truth surrounding the Armenian genocide of 1915, the Irish famine of the 1840s, the trans-Atlantic slave trade of the sixteenth, seventeenth and eighteenth centuries, the St Bartholomew's day massacre of 1572, and the rape of the Sabine women of 750 BCE?

Temporal limits on the Genocide Convention

There is another recent example of judicial reluctance to look too far into the past, this time in a judgment of the International Court of Justice. The debate concerned the retroactive application of the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention was adopted by the United Nations General Assembly in 1948, on 9 December, a date that is henceforth to be commemorated as the International Day of Commemoration and Dignity of the Victims of Genocide.[74]

The Convention's preamble states that 'at all periods of history genocide has inflicted great losses on humanity', adding that its purpose is 'to liberate mankind from such an odious scourge'.[75] The preamble also makes reference to General Assembly Resolution 96(I), adopted two years earlier, that affirmed that '[m]any instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part'.

In a 2008 ruling, the International Court of Justice clearly left the door open on the question of temporal scope of the Convention, noting 'that there is no express provision in the Genocide Convention limiting its jurisdiction *ratione temporis*'.[76] But in February 2015, in its final judgment in the case of *Croatia v. Serbia*, the Court stated definitively that 'the substantive provisions of the Convention do not impose upon a State obligations in relation to acts said to have occurred before that State became bound by the Convention'.[77] Like the European Court of Human Rights, the International Court of Justice pointed to the presumption against retroactivity in article 28 of the Vienna Convention on the Law of Treaties. It acknowledged that the presumption was rebuttable, providing examples of international criminal law treaties with retroactive or retrospective effect, such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. On the other hand, the International Court of Justice cited references in the *travaux préparatoires* of the Genocide Convention where a few States suggested it was 'intended to apply to acts taking place in the future and not to be applicable to those which had occurred during the Second World War or at other times in the past'.[78]

Concluding remarks

Neither the European Court of Human Rights nor the International Court of Justice can be faulted for reaching a conclusion that is not patently unreasonable. Their findings are in line with much of the academic commentary as well as with precedent. Perhaps the only implausible element is the fixation of the European Court on 4 November 1950 as the starting date for the right to truth. To the extent it was deemed necessary to set a 'critical date', it might have been more logical to pick that of the entry into force of the European Convention, in line with the approach of the International Court of Justice. Or the date of adoption of the Universal Declaration of Human Rights, on 10 December 1948, given that the European Convention, according

to the final recital of its preamble, was intended 'to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration'. But this is a detail. At a time when there is a growing movement within human rights law to affirm a right to truth and to insist upon the importance of historical memory, these two Courts seem to have drawn a curtain on the past in or around the year 1950.

Some will say in defence of these judgments that the courtroom is not the place to adjudicate such matters. This message also emerges from a December 2014 decision of the European Court of Human Rights in an application filed by Yevgeniy Yakovlevich Dzhugashvili, a grandson of Joseph Stalin. The applicant had unsuccessfully sued a Russian journalist for defamation concerning an article about the Katyń massacre that described his grandfather as 'a bloodthirsty cannibal'.[79] Declaring the application inadmissible, the Chamber said 'it is an integral part of freedom of expression, guaranteed under Article 10 of the Convention, to seek historical truth. It is not the Court's role to arbitrate the underlying historical issues, which are part of a continuing debate between historians.' It added that '[a] contrary finding would open the way to a judicial intervention in historical debate and inevitably shift the respective historical discussions from public forums to courtrooms.'[80]

It may well be that other institutions, such as truth commissions, are better suited to the complex task of detailed examination of the past. But the suspicion lingers that far from rising to the challenge of dealing with historical truth, the European Court of Human Rights and the International Court of Justice are turning their backs on the 'bloody, black chapters' to which Judge Kovler referred in his dissent in *Janowiec.* Truth is often linked with reconciliation, as the names of many recent commissions bear out. But human experience suggests that sometimes reconciliation is better achieved without clarifying the truth or acknowledging it. Perhaps this is a *leitmotif* in the two judgments.

That there is a right to truth applicable to recent decades seems today beyond dispute. The *Janowiec* ruling of the Grand Chamber of the European Court shuts out pre-1950 atrocities, but at the same time it seems to clear the way for inquiries into events of the second half of the twentieth century, even with respect to States that did not ratify the European Convention until the 1990s. Nor does there appear to be much dispute about the distant past, when there is little suggestion that States intentionally conceal documents and lock their archives, even if legitimate debates about historical

events persist. With respect to these very old atrocities of distant centuries and millennia, States are content to mutter apologies, with varying degrees of sincerity. But there is a problematic grey zone, starting at about 1950 and going back several decades, perhaps a century, when the right to truth still seems to be important yet its recognition encounters resistance, as it did recently in Strasbourg and The Hague.

The right to truth is closely related to the rights to justice and to reparations. In some cases, at the heart of campaigns for historical truth may lie the hope of some compensation, of restored property, of financial gain. But it is also associated with a sense that knowledge of historical truth is intrinsically important. It contributes in a general way to justice, the rule of law, democratic governance and social wellbeing. For reasons that mere law cannot explain, many of us still feel emotionally connected to the not-so-distant past, to the grey zone. Some formulate this as an individual right, based on lineage to increasingly distant generations. The treatment of their immediate ancestors is important although the concern generally grows cold as the time frame becomes more remote. More generally, the 'people', to use the expression of the Joinet and Orentlicher Principles, insist upon knowing the truth about this grey zone, much of it well before our birth yet somehow close enough to engage us directly. In his report on the Spanish Civil War, Special Rapporteur De Greiff has made an intriguing foray into this fog of history. The consequences of his initiative are difficult to assess. He will doubtless receive many entreaties to look at other situations, cases, massacres and atrocities. Only time will tell just how far back human rights law will succeed in establishing a right to truth and whether, like the two prestigious Courts, it will also decide to bolt the door to the past.

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[1] UN Doc. A/RES/2392(XXIII).
[2] (1970) 754 UNTS 73.
[3] ETS 82.
[4] *Mocanu and others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, Concurring Opinion of Judge Pinto de Albuquerque, Joined by Judge Vučinić, § 5, 17 September 2014.
[5] UN Doc. A/RES/95(I).
[6] UN Doc. A/RES/96(II) (emphasis added).
[7] Inter-American Commission on Human Rights, Annual Report, 1985-86, OEA/Ser.L/V/II.68, Doc. 8 rev. 1, p. 193 .
[8] Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, para. 17.
[9] Ibid., Annex II, Principle 1.
[10] Ibid., Principle 2.
[11] Ibid., Principle 5.
[12] Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, Principle 2.
[13] Ibid., Principle 3

[14] UN Doc. A/CONF.189/12 and Corr.1, chap. I, para. 106.
[15] Ibid., para. 98.
[16] Ibid., para. 99.
[17] Ibid., para. 101.
[18] Ibid., para. 102.
[19] Ibid., para. 13.
[20] Right to the truth, UN Doc. A/HRC/RES/9/11, PP 14.
[21] Ibid., PP 15.
[22] Ibid., UN Doc. A/HRC/RES/ 9/11, 0P 7.
[23] Right to the truth, UN Doc. A/HRC/RES/12/12, PP 20. Also: Right to the truth, UN Doc. A/HC/RES/21/7, PP 20.
[24] Right to the truth, UN Doc. A/HRC/RES/21/7, PP 20, OP 10.
[25] Right to the truth, UN Doc. A/RES/68/165, para. 13.
[26] *McCann and Others v. the United Kingdom,* 27 September 1995, §§ 157-164, Series A no. 324.
[27] *Šilih v. Slovenia* [GC], no. 71463/01, § 159, 9 April 2009.
[28] *Association '21 December 1989' and Others v. Romania,* nos. 33810/07 and 18817/08, § 106, 24 May 2011.
[29] Ibid., § 130. Also: *Şandru and Others v. Romania*, no. 22465/03, § 79, 8 December 2009; *Vasiliaulskas v. Lithuania* [GC], no. 35343/05, Dissenting Opinion of Judge Ziemele, § 27, 20 October 2015.
[30] *El Masri v. 'the former Yugoslav Republic of Macedonia'* [GC], no. 39630/09, § 191, ECHR 2012.
[31] Ibid., Joint Concurring Opinion of Judges Tulkens, Speilmann, Sicilianos and Keller, § 6.
[32] *Abu Zubaydah v. Poland*, no. 7511/13, § 489, 24 July 2014.
[33] *Kelly and Others v. the United Kingdom,* no. 30054/96, § 118, 4 May 2001.
[34] *Al Nashiri v. Poland*, no. 28761/11, §§ 481-483, 24 July 2014.
[35] *Janowiec and Others v. Russia*, nos. 55508/07 and 29520/09, § 156, 16 April 2012.
[36] *Janowiec and Others v. Russia*, nos. 55508/07 and 29520/09, § 124, 16 April 2012.
[37] In right to life cases, under some circumstances the European Court of Human Rights will give standing to the next of kin in cases where the victim is no longer alive: *Fairfield and Others v. the United Kingdom* (dec.), no. 24790/04, 8 March 2005.
[38] William Schabas, 'The Katyń Forest Massacre and the Nuremberg Trial', in Morten Bergsmo, Cheah Wui Ling, Song Tianying and Yi Ping, eds., *Historical Origins of International Criminal Law: Volume 3*, Brussels: Torkel Opsahl Academic Publishers, 2015, pp. 249-297.
[39] *Yağcı and Sargın v. Turkey*, 8 June 1995, § 41, Series A no. 319-A; *Broniowski v. Poland* [GC] (dec.), no. 31443/96, §§ 74 et seq., ECHR 2002-X.
[40] Vienna Convention on the Law of Treaties, (1980) 1155 UNTS 331, art. 28. Also: Draft articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. UN Doc. UN Doc. A/56/10, art. 13.
[41] *Kopecký v. Slovakia* [GC], no. 44912/98, § 38, ECHR 2004-IX.
[42] *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 130, ECHR 2009; *Blečić v. Croatia* [GC], no. 59532/00, § 70, ECHR 2006-III.
[43] *Palić v. Bosnia and Herzegovina*, no. 4704/04, § 46, 15 February 2011.
[44] *Moldovan and others and Rostaş and others v. Romania* (dec.), nos. 41138/98 and 64320/01, 13 March 2001. Followed: *Moldovan and Others v. Romania (no. 2),* nos. 41138/98 and 64320/01, § 102, ECHR 2005-VII (extracts); *Kholodov and Kholodova v. Russia* (dec.), no. 30651/05, 14 September 2006; *Bălăşoiu v. Romania* (dec.), no. 37424/97, 2 September 2003.
[45] *Šilih v. Slovenia* [GC], no. 71463/01, § 159, 9 April 2009. See: E. Bjorge, 'Right for the Wrong Reasons: *Šilih v. Slovenia* and Jurisdiction *Ratione Temporis* in the European Court of Human Rights', (2013) 84 *British Yearbook of International Law* 115.
[46] Ibid., § 161.
[47] Ibid., §§ 162-163 (interior reference omitted).
[48] For example, *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, Concurring Opinion of Judge Gyulumyan, 21 October 2013; *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, §§ 7, 31, 21 October 2013.
[49] *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 151, 21 October 2013.
[50] Ibid., § 160.

[51] *Janowiec and Others v. Russia*, nos. 55508/07 and 29520/09, Joint Concurring Opinion of Judges Kovler and Yudkivska, 16 April 2012.
[52] Ibid., Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, § 36.
[53] Ibid., § 33.
[54] Ibid.
[55] *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, §§ 124, 126, 21 October 2013.
[56] Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law,* Vol. I, Cambridge: Cambridge University Press, 2005, Rule 117.
[57] I/A Court H.R., Case of Heliodoro-Portugal v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186; I/A Court H.R., Case of Gomes Lund et al. ('Guerrilha do Araguaia') v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No. 219.
[58] *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 143, 21 October 2013. However, see: *ibid.*, Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, §§ 8, 9, 21 October 2013.
[59] Ibid., Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, § 24, 21 October 2013.
[60] *Perinçek v. Switzerland*, no. 27510/08, § 103, 17 December 2013.
[61] *Perinçek v. Switzerland* [GC], no. 27510/08, § 250, 15 October 2015.
[62] *Monnat v. Switzerland*, no. 73604/01, § 64, ECHR 2006-X.
[63] *Vajnai v. Hungary*, no. 33629/06, § 49, ECHR 2008.
[64] *Orban and Others v. France*, no. 20985/05, § 52, 15 January 2009.
[65] *Lehideux and Isorni v. France*, 23 September 1998, § 55, *Reports of Judgments and Decisions* 1998-VII.
[66] *Editions Plon v. France*, no. 58148/00, § 53, ECHR 2004-IV; *Smolorz v. Poland*, no. 17446/07, § 38, 16 October 2012; *Hachette Filipacchi Associés v. France*, no. 71111/01, § 47, 14 June 2007.
[67] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. A/HRC/27/56/Add.1, paras. 27-33.
[68] Ibid., para. 34.
[69] Reports of States parties pursuant to article 29, paragraph 1, of the Convention due in 2012, Spain, UN Doc. CED/C/ESP/1, paras. 3-4.
[70] Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/13/31, paras. 479-502.
[71] Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/2003/70, para. 247.
[72] See the General Comment on Enforced Disappearance as a Continuous Crime of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/16/48, para.
[73] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/HRC/RES/18/7, OP 1(b).
[74] Prevention of genocide, UN Doc. A/HRC/28/34, PP 22.
[75] *Convention* on the Prevention and Punishment of the Crime of Genocide, (1951) 78 *UNTS* 277, preamble.
[76] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412, para. 123. Also: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 617, para. 34.
[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment,* 3 February 2015, para. 100.
[78] Ibid., para. 97.
[79] *Dzhugashvili v. Russia*, no. 41123/10, 9 December 2014, para 5.
[80] Ibid, para 33. See also *Perincek v. Switzerland*, no. 27510/08, § 99, 17 December 2013; *Irodalom Kft v. Hungary*, no. 64520/10, § 63, 3 December 2013; *Putistin v. Ukraine*, no. 16882/03, Concurring Opinion of Judge Lemmens, 21 November 2013.